

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

DECISION ON ADMINISTRATIVE APPEAL
RE: PUBLIC WORKS CASE NO. 2002-047
LEGACY PARTNERS PROJECT
CITY OF CONCORD REDEVELOPMENT AGENCY

I. INTRODUCTION AND PROCEDURAL HISTORY

On April 7, 2003, the Department of Industrial Relations ("Department") issued a public works coverage determination ("Determination") finding the construction of a 259-unit luxury rental residential project ("Project") by EQR-Legacy Partners 2000 Concord LLC ("Developer") to be a public work subject to the payment of prevailing wages under what is now Labor Code¹ section 1720(a)(1) (as amended by statutes 2001, chapter 938, section 2) and section 1771.

On May 8, 2003 Developer, pursuant to an extension of time granted by the Department, timely filed its Notice of Appeal under 8 California Code of Regulations, section 16002.5. On June 11, 2003 the International Brotherhood of Electrical Workers Local Union No. 302, Plumbers & Steamfitters Local Union No. 159, Sheet Metal Workers Local

¹ Unless otherwise noted, all statutory references are to the Labor Code.

Union No. 104 and Carpenters Local Union No. 152 (collectively "Unions") filed a response to the appeal.

On July 15, 2003 Developer filed a reply, and on July 18, 2003 supplemented the record with a July 16, 2003 two-page letter from Lydia Du Borg, Assistant City Manager, City of Concord.

II. ISSUES ON APPEAL

1. Whether the Concord Redevelopment Agency ("Agency") must be a party to the construction contract for the Project to be determined a public work.

2. Whether Agency's payment of relocation costs constitutes payment of public funds for construction.

3. Whether the Deferred Participation Payment reimbursement plan converts Agency's payment of relocation costs into a loan.

4. Whether the payment of the net tax increment revenues constitutes payment of public funds.

III. RELEVANT FACTS

On November 14, 2000, Agency and Legacy Partners 2273 LLC entered into a Disposition and Development Agreement ("DDA") for the development and construction of the Project. On July 20, 2001, Legacy Partners 2273 LLC assigned its rights and obligations under the DDA to Developer.

The Project is set on 4.59 acres in the City of Concord ("City"). At completion, it will include two four-story buildings, two parking structures and a swimming pool.

Developer has retained Daniel Silverie III, Inc. to construct the Project for an estimated cost of \$30 million.

The Project site originally consisted of 21 improved parcels, including two owned by City and one owned by Agency. The remaining parcels were owned by private parties, most of whom were under contract to sell to Developer ("Developer Parcels").

Under the DDA, Agency agreed to acquire and assemble the 21-parcel site for construction of the Project. To accomplish this, Agency, using Developer funds, completed the sale of the privately owned parcels. In addition, Agency purchased the City owned parcels and sold them along with the Agency parcel ("Agency Parcels") to Developer for the fair market value of \$490,000.

Agency's Financial Assistance

A. Relocation Costs.

According to Developer, a total of \$689,000 in relocation costs was paid on the Project. A portion of these costs was paid by Agency.

Under the DDA, Developer agreed to purchase the Agency parcels for \$490,000. This purchase money was advanced to Agency before the close of escrow. This advance was made "...so that Agency could use the money to pay relocation costs." (Developer's Appeal, p. 6.) The \$490,000 was put into Agency's coffers and as Agency states: "The purchase money funds provided by [Developer] were used by the Agency

to pay the Agency's relocation obligations." (July 16, 2003 letter from Lydia Du Borg, Assistant City Manager, City of Concord.)

The balance of the relocation costs came from an additional payment by Agency of \$47,500 and a further payment by Developer to Agency of \$152,000.²

In sum, Agency paid \$537,500 (\$490,000 from the purchase money from the sale of the Agency parcels and an additional \$47,500) in relocation costs, and Developer paid \$152,000 to Agency for the remaining relocation costs.³

B. Net Property Tax Increment Rebate.

Under the DDA, Agency is to provide Developer a portion of the "net property tax increment revenues" Agency will receive as a result of the construction of the Project. For the first ten years following construction, Developer is to receive 100 percent of the net tax increment revenues in the form of a property tax rebate. Should the value of the Project not exceed \$270,000 per unit and other contingencies, Developer is to receive 100 percent of the net tax increment revenues for an additional ten years. The Summary Report Pursuant to Section 33433 of the California Community Redevelopment Law ("Summary Report"), dated

² Although the Developer's Appeal states the total amount of relocation costs was \$689,000, the amounts set out in the Appeal as contributed by the parties amount to \$689,500.

³ Despite the quoted language above, in its appeal Developer implies the \$490,000 payment was made as part of its obligation under the DDA to pay the first \$525,000 in relocation costs (Appeal, p. 6). If this were true, Agency gifted the Agency parcels to Developer, a position denied by Developer throughout its Appeal.

October 27, 2000, estimates the tax rebate paid to Developer over a 20-year time period will be approximately \$2,692,000. The Summary Report also states that this tax rebate, along with the Agency's assistance in assembling the Project site, is necessary to provide "the financial incentive to develop this project." (Summary Report, p. 10.)

C. Deferred Participation Payments.

The DDA provides that upon the occurrence of certain capital events, e.g., sale or refinancing of the Project, Developer will pay to Agency a percentage of profits received. The Summary Report, based on the assumption that there will be a refinance and two sales of the property during the first 20 years, predicts that Agency will receive deferred participation payments in the total sum of \$642,000. According to the DDA, these deferred participation payments are to offset costs incurred by Agency in assembling the Project site. Agency recognizes, however, that the success of the Project allowing for these deferred participation payments is uncertain, and there is no guarantee Agency will receive them (Summary Report, p. 11).

IV. ANALYSIS

1. SECTION 1720(a)(1) DOES NOT REQUIRE AGENCY TO BE A PARTY TO THE CONSTRUCTION CONTRACT.

Developer argues that since Agency did not enter into a construction contract, the Project does not fall within the

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prevailing wage laws, i.e., Section 1720. It contends the DDA is a land development transaction and not a construction contract. Developer points out the DDA does not require the payment of prevailing wage nor make any reference to the Labor Code.

The precedential decisions of this Department have long held that Section 1720(a)(1) does not require a public entity to be a party to the construction contract to trigger the prevailing wage requirements. Section 1720(a)(1) only requires that there be construction, performed under contract, and paid for in whole or part out of public funds *Goleta Amtrak Station*, PW 98-005 (November 23, 1998) at page 5; *Lewis Center for Life Sciences*, PW 99-052 (November 12, 1999) at page 2).

Additional support for this position is found in the California Supreme Court decision in *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976. In *Lusardi*, the construction contract was purportedly between two private entities, yet the project involved was still found to be a public work. The focus is on whether there is construction performed under a contract that is paid for in whole or part with public funds, not whether the Agency signed the contract.

The Court in *Lusardi* also pointed out that the requirement to pay prevailing wages is statutory and not dependent on the language of the agreement. Hence, the

fact that the DDA does not require the payment of prevailing wages does not determine whether the Project is a public work.

2. AGENCY'S PAYMENT OF RELOCATION COSTS CONSTITUTES PAYMENT OF PUBLIC FUNDS FOR CONSTRUCTION.

A. Payment Of Relocation Costs Is Payment For Construction.

Clearly, Agency's payment of relocation costs constitutes the payment of public funds. Developer argues that such funds are not payment for construction because the term "construction" in Section 1720(a)(1) does not include the relocation process in a redevelopment project. While admitting that the definition of construction in Section 1720(a)(1) was expanded on January 1, 2001 (Senate Bill 1999) to include "work performed during the design and pre-construction phases of construction ...," Developer, asks the Department to limit the definition of construction, i.e., pre-construction activities, to survey work. The interpretation suggested by Developer would not only contradict this language of the statute defining "construction," it would prove inconsistent with the historical definition set forth in Department precedential determinations and case law.

Even prior to the amendments enacted in Senate Bill 1999, the word "construction" had been given a broad definition. In *Priest v. Housing Authority of the City of Oxnard* (1969) 275 Cal.App.2d 751 the court stated

early as 1999, this Department recognized that payment of relocation costs was part of the construction process (*Riverview Business Center Office Building D*, PW 99-039 (November 17, 1999)). This view was affirmed in *Town Square Project/City of King*, PW 2000-011 (December 11, 2000), which stated that payment of site assembly costs, including relocation costs, is payment for construction since it is "...for activities integrally connected to the construction of the Project ... without which the Project could not have been developed." (*Town Square Project/City of King*, *supra*, at p. 5.)

Developer attempts to distinguish the *Town Square/City of King*, *supra*, by arguing that it was the gift of land by the redevelopment agency, not the payment of site assembly costs, that triggered prevailing wage requirements. Developer's reading of *Town Square/City of King* is incorrect. In that precedential determination the Director made clear that, independent of the gift of land, the payment of the site assembly costs, including relocation costs, alone constitutes payment of public funds for construction.

Interpreting the word "construction" broadly to include not only the actual building of a structure, but the activities integrally connected to the building and without which a project could be built is consistent with the purpose of the prevailing wage law, as expressed in *Lusardi*,

to protect employees and the public on public works projects.

B. Agency's Obligation To Pay Relocation Costs Under The Government Code Does Not Preclude The Department From Determining That The Payment Of These Costs Constitutes A Payment Of Public Funds For Construction Under The Labor Code.

Under the Government Code, Agency is required to pay relocation costs to persons displaced as a direct result of projects it undertakes (Govt. Code §§ 7260.5(b) and 7260(c)(2)). Developer argues that since Agency's payment of relocation costs are required by statute and are related to moving expenses, they cannot be considered public funds for construction under Section 1720(a)(1). Developer does not provide any legal authority for its syllogistic argument.

The Government Code sections relied on by Developer simply require payment of relocation costs when a public entity undertakes a project that results in the displacement of persons from the project area. These statutes do not address whether the payment of these costs trigger prevailing wage requirements. A determination whether a project is a public work, including under what circumstances the payment of public funds is for construction, is solely within the purview of the Director of Industrial Relations. *Lusardi Construction Co. v. Aubry, supra*, 1 Cal 4th at 988-989). Here, the Director has determined that payment of these costs with public funds are integrally connected to

the construction of the Project and therefore the Project is a public work requiring payment of prevailing wages.

C. Section 1720(c)(3) Exemption From The Payment Of Prevailing Wages Is Inapplicable To The Project.

Developer also argues that the recent amendments to Section 1720(a) (SB 975), effective January 1, 2002, adding what is now Section 1720(c)(3)⁴, excludes relocation costs from the definition of public funds since they are funds that would normally be borne by the Agency. Section 1720(c)(3), however, is inapplicable for two reasons.

First, Section 1720(c)(3) went into effect over a year after the DDA was signed. It is therefore not the applicable law to the Project.⁵

Second, even if Section 1720(c)(3) did apply, it would only apply if the project is an "otherwise private development project." Here the Project relies on public funds, including the net tax increment revenues discussed below, for its construction. In addition, the DDA provides the Agency with substantial control over the design and construction of the Project. Therefore the Project is not an otherwise private development.

⁴ Section 1720(c)(3) reads: "If the state or a political subdivision reimburses a private developer for costs that would normally be borne by the public, or provided directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter."

⁵ Developer agrees SB 975 has no application to this case (see Appeal, p. 24).

3. THE POTENTIAL OF FUTURE DEFERRED PARTICIPATION REIMBURSEMENTS DO NOT CHANGE THE CHARACTER OF THE RELOCATION COST PAYMENTS TO A LOAN.

In consideration of Agency's financial assistance, including the payment of relocation costs, for the construction of the Project (DDA, §§ 601 and 602), the DDA provides for Developer's payment to Agency of "Deferred Participation Payments" upon the occurrence of certain capital events. These capital events include condemnation, sale, or refinance of the Project. Developer argues that this commitment transforms the payment of relocation costs from a payment of public funds into a loan on the basis that it is no different than the contractor's reimbursement of the \$70,500 performance and payment bond premium in *McIntosh v. Aubry* (1993) 14 Cal.App.4th 1576 which the court found to be a loan.

In *McIntosh*, the public agency paid the construction bond premiums with the understanding that the contractor would reimburse the agency if the cost of the on-site improvements exceeded \$5 million (*Id.*, at 1590). Under these facts the court found that the payment was really a loan. The facts relied on by the court in *McIntosh* in reaching this result however, do not exist in this case and therefore, the *McIntosh* decision has no application here.

In *McIntosh*, the contractor was required to perform the on-site improvements. The only question was whether the cost

of these improvements would exceed the threshold amount. Here, there is no obligation by Developer to refinance or sell the Project, events that trigger the reimbursements.

In addition, in McIntosh the full cost of the performance bonds, i.e., \$70,500, was to be paid completely if the threshold construction cost was reached. Here, there is no guarantee a sale or refinance of the Project will result in full reimbursement of the relocation costs spent by Agency. The amount to be paid is based on a percentage of the gross proceeds of the capital event and it is complete speculation to say how much, if any, the Deferred Participation Payments will amount to.

Finally, Developer also argues that these deferred payments are similar to the loan payments made by the developer in Silverado Creek Apartments, PW 99-074 (September 27, 2000). Developer's reliance on this determination is also unavailing. In Silverado Creek Apartments, the agency loaned funds with a commitment by the developer to repay the full amount lent. Here, Developer has not made any commitment to repay any or all of the public funds paid by Agency. As stated in 13th and F Street Townhouse Development/City of Sacramento, PW 2000-042 (January 23, 2001) at page 2, "[i]mplicit in the legal construct of a loan is the obligation to repay." Here Developer has not undertaken an obligation to repay the

funds spent by Agency on the Project. Hence Agency's payment of the relocation costs is not a loan.

4. AGENCY'S PAYMENT OF NET TAX INCREMENT REVENUES
CONSTITUTES PAYMENT OF PUBLIC FUNDS FOR CONSTRUCTION.

Developer makes several arguments why the payment of the net tax increment revenues cannot be considered payment of public funds for construction. Before addressing these, it is important to set forth Agency's and Developer's stated purpose for the payment of these funds.

The DDA requires that after completion of the Project, Agency is to pay to Developer 100 percent of the first 10 years of net tax increment revenues Agency receives from the County of Contra Costa. Depending on the net operating income from the Project, these payments will continue for an additional 10 years. The Summary Report estimates these revenues will exceed \$2.5 million (see Summary Report, p. 8). According to the DDA these payments are to be made in consideration of the construction of the Project (DDA § 601). The Summary Report states this financial assistance is necessary to provide Developer "the financial incentive to develop this project." (Summary Report, p. 10.) Notwithstanding these stated purposes, Developer advances three arguments that the net tax increment revenues are not public funds for construction: one, the revenues amount to forbearance or forgiveness (waiver); two, the tax revenue is to reimburse Developer for the cost of the land, not for

construction; and three, receipt of these funds are uncertain. None of these arguments is supported by the facts or law.

A. The Net Tax Increment Revenues Do Not Constitute A Forbearance Or Waiver.

Relying on *McIntosh v. Aubry, supra*, at 1576, Developer argues that the payment of the net tax increment revenues amount to a forbearance or waiver of property taxes that Developer would otherwise have to pay. Developer reasons that since the portion of property taxes that are rebated to it under the DDA are part of the same property taxes it originally paid to the County as a result of improving the 21 parcels, the rebate amounts to a waiver or forbearance and does not constitute payment of public funds. As discussed below, *McIntosh* does not provide any legal support whatsoever to Developer's argument.

In *McIntosh, supra*, the court held that an agreement to forego the collection of rent by the county was not a payment of public funds. It was a forbearance, not a payment. Likewise the court found that the County's waiver of collecting inspection costs could not constitute the payment of public funds since there was no physical payment out of county coffers (*McIntosh v. Aubry, supra*, at 1587-1590). Here, however, there is an affirmative payment of public funds out of Agency's coffers. The County of Contra Costa collects the property taxes and then sends to Agency

the net tax increments, which are deposited into Agency's account. These revenues will then be paid out to Developer as required under the DDA. Thus, there is a payment of public funds.

B. Because Site Assembly Is Integrally Connected To The Construction Of the Project, The Payment Of The Net Tax Increment Revenues Is A Payment Of Public Funds.

Developer and Agency state that Developer paid \$6.189 million for the 21-parcel Project site. According to the appraisals, this purchase price exceeds the site's fair market value by \$1.28 million and the fair reuse value by \$2.92 million. Developer and Agency argue that the payment of the net tax increment revenues is to provide tax relief to help offset the cost to Developer in acquiring the Project site.⁶ Hence, according to Developer and Agency, this money was not a subsidy for construction and cannot be characterized as public funds for construction.

As already noted above, the word construction in 1720(a)(1) is to be given a broad definition. It is to include activities integrally connected to the actual building (*Town Square Project/City of King, supra*; *City of Long Beach, supra*, at 646). Under these authorities, site assembly is part of construction.

⁶ Contrary to Developer and Agency's position, section 601.2 of the DDA states that this tax revenue can be applied to reimburse off-site public improvements and development fees as well as site acquisition costs.

Developer argues that the instant case is distinguishable from *Town Square/City of King* because here the Developer paid for the land and all site assembly costs. As Developer puts it, "There has been no subsidy for the purchase of land and/or construction as occurred in *Town Square* It is one thing for an agency to provide free land, as was the case in *Town Square Project*. It is quite another thing for an agency to provide tax relief in recognition of the fact that the developer had paid more than fair reuse value of the land." (Developer's Reply to Local Union's Opposition, p. 3.) Developer misunderstands the *Town Square* determination. Under *Town Square*, payment of public funds towards site assembly or land purchase is considered an integral part of the construction process. In this case there is no question Agency is reimbursing Developer for its land and site assembly costs. It makes no difference that Developer paid more than the fair market value for the site. The focus is on whether Agency is paying its funds to assist the construction. Here Agency is subsidizing the construction of the Project by reimbursing Developer for land and assembly costs.

C. Payment Of The Net Tax Increment Revenue Is Not Uncertain.

Developer argues that it is not certain that any net tax increment revenues will ever be generated because it is not known whether the Project will increase the value of the

land after the Project is completed. Without knowing in advance whether the property value will increase, it is impossible for the Department, according to Developer, to make a determination that the Project is a public work.

It is true the net tax increment revenues will not begin until the Project is built. To argue that it is impossible to know whether the assembled 21 unimproved parcel site will increase in value after the 259 luxury residential rental units have been built, asks the Department to not only ignore the economic effect of \$30 million improvements on this land but to ignore its public policy mandate to protect and benefit employees on public works projects (*Lusardi Construction Co. v. Aubry, supra*, at 985). Under Developer's argument, the Department would have to wait at least a year after the Project was completed to determine if it was a public work. To wait this long would frustrate the Department's ability to enforce the prevailing wage laws under Section 1741, since the Department only has 180 days after a notice of completion is filed to investigate and issue an assessment and penalty for failure to pay prevailing wages. Under Developer's approach, developers and public entities would have a convenient loophole to avoid paying wages due to California workers on a public work. For all of these reasons, Developer's argument that the payment of net tax increment revenues is

too uncertain preventing a determination at this time is rejected.

5. NO HEARING IS REQUIRED.

Developer requests a hearing under Title 8, California Code of Regulations, section 16002.5(b), which states that the decision to hold a hearing is within the Director's sole discretion. Because the material facts are undisputed and the issues raised are legal ones, there are no factual issues to be decided and no hearing is necessary. Developer's request is therefore denied.

IV. CONCLUSION

For the reasons discussed above, Developer's Appeal is denied and the Determination that the Project is a public work subject to the payment of prevailing wages is sustained.

Date: 10-29-03

Chuck Cake
Chuck Cake, Acting Director